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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,

Petitioner,

v.

ALEXIS M. HERMAN, Secretary of the United States Department of Labor,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; ADMIRAL INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; EVANSTON GROUP, INC.; GREAT AMERICAN INSURANCE COMPANY; SYNDICATE 435 AT LLOYD'S LONDON, D.P. MANN UNDERWRITING AGENCY, LTD.; SYNDICATE 1212 AT LLOYD'S LONDON, S.J. BURNHOPE AND OTHERS; SYNDICATE 79 AT LLOYD'S LONDON, JANSON GREEN, LTD.; AND SYNDICATE 861 AT LLOYD'S LONDON, M.E. BROCKBANK SYNDICATE MANAGEMENT, LTD.

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF SOUTH CAROLINA NATIONAL BANK

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INTEREST OF AMICI CURIAE

Amici curiae[1] are carriers that insure bank trust departments, corporate directors and officers, lawyers, accountants and others against professional liability claims. The insurance offered by amici includes coverage for the defense and settlement of lawsuits, like this one, alleging breach of fiduciary duties under ERISA. Amici also filed a brief in this matter in the United States Court of Appeals for the Eleventh Circuit.

Amici regularly deal with claims against their insureds that are filed, or are threatened to be filed, in various state and federal courts. At least until now, experience has shown that most claims are resolved by compromise and settlement—either before or after commencement of litigation. Where resolution of a claim is possible without resort to the courts, typically the settlement is documented by a written agreement and includes a release of all claims for which monetary relief is or might be sought. Where litigation has been commenced, the settlement agreement and release are usually accompanied by a final judgment dismissing the claim or confirming the settlement terms, entered by the court that has exercised jurisdiction over the dispute. This is the reality of our civil liability system; although many claims are litigated, relatively few are resolved by a full trial on the merits.

In fact, under the laws of many states, insurers are required to accept reasonable settlement demands with-

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[1] This brief is filed with permission of the parties. Written consents have been provided to the Clerk of the Court. All of this brief was authored by the undersigned counsel and the cost of the brief was borne entirely by amici.

in policy limits; if they refuse such demands, they face potential liability in excess of policy limits for "bad faith." *See, e.g. State Farm Mut. Auto. Ins. Co. v. Hollis*, 554 So. 2d 387, 389-90 (Ala. 1989); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983); *Commercial Union Ins. Co. v. Safeway Stores, Inc.*, 610 P.2d 1038, 1040 (Cal. 1980); *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929). In evaluating whether a settlement demand is reasonable and in the best interests of the insured, an insurer must weigh anticipated litigation costs and the risk of an adverse judgment against the benefits attendant to the settlement. In the class action context, insurers must also consider the number and identity of persons who may opt out of the settlement in order to assess the scope of protection provided by the proposed releases.

The Eleventh Circuit's decision in this matter forces amici into a trap similar to the infamous "Catch-22." On the one hand, they are duty-bound to protect their insureds by pursuing reasonable settlements of private ERISA fiduciary liability claims within policy limits; on the other hand, they can never obtain reasonable protection for their insureds because there will always remain a prospect of future litigation by the Secretary over the same claims—the second time, of course, with reduced or depleted coverage. Disturbingly, the ramifications of the decision below are not limited to the Department of Labor and ERISA fiduciary liability claims. The Eleventh Circuit's reasoning allows any federal agency having enforcement powers to seek additional monetary relief for members of a class subsequent to and in spite of a determination by a federal district

judge pursuant to Fed. R. Civ. P. 23(e) or 23.1 that the amount of the settlement agreed to by the class is fair and reasonable.

Amici believe it beyond dispute that fewer defendants would be willing to settle private ERISA claims if they would remain fully exposed to the same liability on identical claims should the Secretary later choose to sue them. Perhaps some would continue the litigation until the limitations period applicable to the Secretary expired, settling thereafter on the same or similar terms. Others might consider an earlier settlement despite the continuing risk, but almost certainly would not be willing to pay as much as they would if finality could be assured. The remainder would be forced to proceed to trial on claims that otherwise might have been settled. The same dynamic is likely to occur in the myriad of other contexts where Congress has created both a private right of action and a regulatory enforcement function entitling a government agency to seek monetary relief for private individuals. Complex civil cases will be more likely to proceed to trial, which will make it more difficult for trial courts to manage their dockets effectively.

It is this prospect that gravely concerns amici and prompts them to submit this brief. Currently, professional liability insurance is an expensive commodity.[2] And this is true now, when nearly every case is resolved before trial. If a greater percentage of complex

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[2] For example, the average premium in 1997 for primary directors' and officers' liability insurance was $233,480. 1997 Watson Wyatt Worldwide D & O Liability Survey Report at 3.

claims were expected to go to trial, amici would be forced to raise premiums substantially, limit coverage more extensively, and perhaps even discontinue some of their fiduciary liability programs. Increased difficulty in obtaining liability coverage would, in turn, limit the ability of fiduciaries to respond to claims—meritorious or otherwise—and to compensate plan participants for their losses. A lack of adequate and affordable coverage would deter qualified fiduciaries from representing employee benefit plans altogether. Furthermore, analogous repercussions might alter the structure of other insurance programs, such as those aimed at risks stemming from alleged violations of employment, consumer protection or securities statutes.

ARGUMENT

A. The Eleventh Circuit's Decision Undermines the Incentives to Settle and the Finality of Judgments.

1. The Decision Below Undermines the Strong Judicial Policy Favoring Settlement.

There is a strong federal policy favoring pretrial settlement of class action lawsuits. This Court recently instructed that, under some circumstances, it is proper to certify a class action for settlement purposes even if a class could not be certified on an adversarial basis. *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2248 (1997). Recognizing that in a class action persons who did not actively participate in the litigation would be bound by a judgment entered upon settlement, Congress provided in Rule 23(e) that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(e). Rule 23.1, which applies to derivative actions, contains substantively identical language.

This Court has established a number of "requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). As *Shutts* reiterated, these requirements are grounded in procedural due process. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

Here, the parties provided notice of the proposed settlement to the class and the Secretary. The district court approved the settlement only after conducting an evidentiary hearing to determine whether the proposed settlement was fair, reasonable, adequate and in the best interests of the class. The district court's determination should not be vulnerable to attack absent evidence of fraud or collusion. In other words, the Secretary should not be permitted to substitute her own notions of fairness for those of the district court, particularly when she consciously chose not to appear at the hearing. The Eleventh Circuit's holding undermines the entire purpose of the class action device, which is to conserve the resources of both the courts and the parties by allowing an issue affecting each member of a

class to be litigated only once. *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

If class actions are to settle, Rule 23(e) must provide an assurance of finality not only to the class members but to the defendants and their insurers. A district court's approval of a settlement and the accompanying releases must provide certainty that the settled claims have been fully and finally resolved. The Eleventh Circuit's decision, however, diminishes the incentives for defendants and their insurers to compromise claims given the prospect of future lawsuits brought by government agencies asserting the settled claims.

2. The Eleventh Circuit's Decision Undermines Confidence in the Finality of Judgments.

The district court held that the doctrines of res judicata and release precluded the Secretary's claims against Petitioner for money damages under Section 502(a)(2)[3] because the Secretary could obtain such relief only on behalf of the class that had previously settled. The doctrine of res judicata (or claim preclusion) promotes legal economy and certainty. It ensures the finality of judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). To promote these interests, the lower courts have regularly applied the doctrine, even when it prevented a government agency

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[3] 29 U.S.C. § 1132(a)(2). This statute authorizes both the Secretary of Labor and private parties to bring civil suits for breach of fiduciary duty against ERISA plan fiduciaries.

from bringing suit on behalf of persons who had previously resolved their own claims. *See, e.g., FTC v. AMREP Corp.*, 705 F. Supp. 119, 124-25 (S.D.N.Y. 1988) (barring government claims under principles of res judicata and release out of respect for finality of earlier private settlement). South Carolina National Bank ("SCNB") cites numerous other authorities on this point (*see* SCNB Pet. at 8-12), and amici will not duplicate its argument.

The tension between the Eleventh Circuit's decision and the approaches the lower courts have taken is illustrated by *In re Baldwin-United Corporation*, 770 F.2d 328 (2d Cir. 1985). Although decided under the All Writs Act, 28 U.S.C. § 1651, *Baldwin-United* stands for the proposition that government agencies will not be permitted to disturb a court-approved class action settlement by relitigating claims on behalf of settling parties. In that case, private plaintiffs were on the verge of settling a multi-district class action consolidated in the district court. Before the settlement was finalized, several state attorneys general announced their intention to invoke various state laws authorizing them, in their representative capacities, to seek restitution and monetary recovery for the same plaintiffs. Fearing that the threatened state court actions would jeopardize the settlement, substantially increase the costs of the litigation, and create a risk of inconsistent results, the district court enjoined all conflicting state proceedings in order to preserve its jurisdiction. *Id.* at 333.[4]

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[4] The Second Circuit was careful in *Baldwin-United* to distinguish between claims to be brought by the attorneys gen-

(continued...)

The Second Circuit upheld the injunction, noting that once judgment was entered, the parties could invoke res judicata in state courts to bar the threatened suits. Because the class plaintiffs had agreed to release all claims against defendants, a post-settlement injunction would have precluded the attorneys general from bringing state law claims derivative of plaintiffs' rights. *Id.* at 336. The Second Circuit recognized that no defendant could reasonably be expected to settle claims if those same rights could be reasserted by a state or any other representative seeking to recover money on behalf of the settling plaintiffs. *Id.* As the court put it,

> The success of any federal settlement [is] dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs [have] against the settling defendants based on the same facts. If states or others could derivatively assert the same claims on behalf of the same class or members of it, there could be no certainty about the finality of any federal settlement.

Id. at 337.

Such reasoning ought to apply with equal force to this case. If the Eleventh Circuit is correct and the Secre-

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[4] (...continued)
eral in a representative capacity and those to be brought on behalf of the public at large, such as claims for injunctive relief or to enforce criminal laws. 770 F.2d at 339, 341. While the former were enjoined, the latter were not. This distinction comports with the public interest/private benefit analysis undertaken by numerous courts applying the doctrine of representative claim preclusion against government agencies which is discussed more fully in both of the Petitions and the next section of this brief.

tary may pursue her claims for pecuniary relief, defendants could not reasonably be expected to settle private ERISA fiduciary liability claims nearly as often as they have in the past. Under a looming threat of government action, such defendants would either refuse to settle or, at a minimum, reduce the amounts they would be willing to pay to account for their continuing exposure on the same claims. As the Second Circuit noted, similar considerations would undermine the desirability and, consequently, the odds of settlement in any situation where a government agency can derivatively re-assert the money damages claims that the private parties have already settled.

If the Secretary is correct that she is not bound by the monetary terms of private settlements, parties contemplating settlement of ERISA suits might be forced to attempt joinder of the Secretary in order to ensure finality and shield defendants from successive litigation and inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(2)(ii). The Secretary, however, asserted in the district court that she is not amenable to involuntary joinder in ERISA cases. (*See* Secretary of Labor's Objections to Motion to Consolidate, Motion for Leave to File Third Party Complaint and Motion for Status Conference and For Stay of Discovery Pending Status Conference, at 20-24) ("There is no basis for SCNB's assertion that the Secretary's asserted interest creates a risk of inconsistent or multiple obligations or that Rule 19 provides a means of compelling the Secretary to participate in litigation between private parties."). If the Secretary's position is upheld, no district court could finally and forever dispose of a private Section 502(a)(2) claim by the force of its judgment. The specter

of additional litigation by the government would always remain.

Even if joining the Secretary were a simple matter, common sense suggests that the addition of the Department of Labor as a party to a private ERISA case would inevitably lead to increased delays, greater litigation costs, and an unnecessary expenditure of judicial resources. According to the Director of the Administrative Office of the United States Courts, between October 1, 1996 and September 30, 1997, 10,045 ERISA lawsuits were filed in the United States District Courts. *See* Judicial Business of the United States Courts, 1997 Report of the Director, Table C-2. Of these 10,045 suits, only 168 involved the United States government (141 as plaintiff, 27 as defendant); the remaining 9,877 involved only private parties. *Id.*[5] During that same twelve-month period, 98.2% of all ERISA cases settled or were otherwise resolved prior to trial; only 1.8% actually reached the trial stage. *Id.* at Table C-4.[6]

If, as a result of the Eleventh Circuit's decision, ERISA defendants concluded they had to join the Secretary to ensure finality, there would inevitably be lengthy delays and an excessive drain on judicial resources. Instead of direct involvement in 168 cases per year, the Secretary's participation might be required in

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[5] The Report of the Director does not contain statistics distinguishing fiduciary liability suits under Section 502(a)(2) from other ERISA actions.

[6] The statistics quoted from Table C-2 reflect the commencement of ERISA cases, while the statistics reported in Table C-4 reflect the disposition of "other labor litigation," a somewhat broader category made up primarily of ERISA cases.

many more of the remaining 9,877 cases. If, on the other hand, the Secretary's joinder in ERISA suits cannot, as she asserts, be compelled, then many more of the 98% of ERISA fiduciary liability cases that now settle would have to be tried to their costly conclusion—with the remainder either settled for amounts less than the plaintiffs could obtain if they could sell complete peace, or litigated until either the Secretary commenced a parallel action or the applicable limitations period expired.

In short, the holding below jeopardizes settlement in nearly all ERISA fiduciary liability cases between private parties and is likely to further clog the dockets of the federal courts. Moreover, under a variety of other statutory schemes, private parties, confronted with the Eleventh Circuit's reasoning, may be reticent to settle for fear of further government enforcement actions brought by agencies seeking to augment the private plaintiffs' recovery.

B. The Eleventh Circuit's Decision Is Untenable.

In addition to its inconsistency with important judicial policies, the decision below is inconsistent with the doctrines of res judicata and release.

1. Res Judicata Precludes Representative Claims by Government Agencies on Behalf of Persons Who Previously Settled the Same Claims.

Under principles of res judicata (or representative claim preclusion), a final judgment on the merits bars further claims by parties or their privies based on the

same cause of action. *Montana v. United States*, 440 U.S. 147, 153 (1979). This principle applies with equal force in a class action. As this Court explained in *Cooper v. Federal Reserve Bank of Richmond*:

> There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly maintained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.[7]

467 U.S. 867, 874 (1984) (citations omitted).

In the present case, there is privity between the government agency (the Department of Labor) and the class of private individuals that earlier settled. With respect to the Department of Labor's claims for monetary relief, privity turns on whether the agency is acting to vindicate a broad public interest or, instead, is seeking relief in a representative capacity. The district court acknowledged the Secretary's interest in safeguarding the public interest by permitting her to

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[7] This language was recently quoted with approval in the majority opinion in *Matsushita*, 516 U.S. at 379.

pursue her claims for equitable relief. The district court, however, correctly found that the Secretary's representative claims for monetary relief on behalf of the plan participants were barred by the doctrine of res judicata.

The Eleventh Circuit's reliance on the "general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests," SCNB App. at 22a, ignores the crucial fact that the only interest the Secretary has left in the present case is to obtain more money for a class that has already settled with the same defendants the Secretary is pursuing. SCNB Pet. at 8 (noting that the injunctive and declaratory relief claims raised by the Secretary have been settled and citing the relevant pages of the record). That interest is strictly private. Hence, the decision below expands and twists the principle upon which it relies beyond recognition.

There is simply no reason why a government agency acting in a purely representative capacity should not be bound by a prior settlement knowingly entered into by those the agency purports to represent. The interests of the class are fully protected by Fed. R. Civ. P. 23 and the Due Process Clause. Private class litigation is intended, by Congressional design, to "provide a significant supplement to the limited resources available" to the federal government to enforce the law and deter violations. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). When such litigation is successfully settled, after court approval and with the government's informed acquiescence, established principles of res judi-

cata ought to preclude the government from relitigating the claim for monetary relief. The tension between the Eleventh Circuit's decision and the doctrine of res judicata justifies this Court's review of the decision below on its merits.

2. The Doctrine of Release Bars the Secretary's Representative Claims for Pecuniary Relief.

A valid release bars the relitigation of all claims encompassed by the release by or on behalf of those persons covered by the release. This Court has previously noted that an individual's acceptance of benefits from a government enforcement action brought in a representative capacity can be conditioned upon a release of the "right to bring a separate private action." *General Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980). Analogously, the lower courts have held that private parties can release the right to have an action brought on their behalf. *See, e.g., FTC v. AMREP Corp.*, 705 F. Supp. at 125; *Korn v. Franchard Corp.*, 388 F. Supp. 1326 (S.D.N.Y. 1975) (courts will not interfere with a party's knowing and voluntary decision to bargain away his rights out of concern that a federal statute might be under-enforced). In *FTC v. AMREP Corp.*, the court enforced a voluntary and knowing release of claims executed by a group of land purchasers pursuant to a class action settlement and precluded the FTC from bringing a separate action to the extent it sought relief on behalf of the settling class members. 705 F. Supp. at 125.

Courts regularly enforce broad releases executed pursuant to class action settlements, including releases of

claims outside the settlement court's jurisdiction as well as releases binding persons who did not consent to the settlement. For example, in *Matsushita*, this Court upheld the preclusive effect of a state court class action settlement notwithstanding that, pursuant to the settlement, the class plaintiffs had released securities claims within the exclusive jurisdiction of the federal courts.

Here, the class action settlement included a release of all existing and potential claims on behalf of class members. The class members' bargain to release these claims should be enforced, and the Secretary should be precluded from bringing an action to the extent it seeks relief on the releasors' behalf. As a practical matter, attaching preclusive effect to the class action settlement at issue here should be far less troubling than it was to the dissenters in *Matsushita*. This is true because the claim the Secretary seeks to pursue here is founded upon the same statutory provision as the claim litigated and settled in the private class action.

There has been no suggestion in the present case that the settlement of the private class action was inconsistent with the dictates of Rule 23 or the requirements of procedural due process. Unless the release is enforced in this case, the finality of virtually every private ERISA fiduciary liability settlement could be defeated by subsequent suits filed by the Secretary on behalf of the settling plaintiffs. Inevitably, the prospect of such additional litigation would reduce, if not eliminate, the chances for settling the vast majority of ERISA cases. Failure to enforce the release here could also undermine the finality of settlements of claims based upon any federal statute allowing for both private party and

government enforcement, thereby affecting a wide variety of employment, consumer protection, and securities claims.

To take it a step further, if the class members' releases are not enforced in this case, insurers may refuse to participate in the settlement of many complex cases. When evaluating whether a proposed settlement is reasonable, insurers must consider the scope of the releases to be given to the insured party. In many circumstances, insurers insist on indemnification or judgment reduction agreements (or both) from private plaintiffs where fewer than all claims against the insured are resolved. If insurers cannot be certain that releases will be upheld, however, they will not be able to assess the reasonableness of proposed settlements and may be far less likely to fund settlements.

CONCLUSION

The professional liability insurance carriers that have joined as amici curiae urge this Court to grant the petition for a writ of certiorari so as to consider, as a matter of both law and public policy, whether the prior class action settlement bars the Secretary from bringing her claim for pecuniary relief in a representative capacity.

Respectfully submitted,

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